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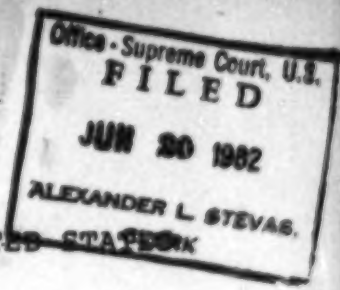

NO. _____

IN THE SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1981

MARVIN DALTON,	)
	)
Petitioner,	)
	)
-vs-	)
	)
EMPLOYMENT SECURITY COMMISSION OF NORTH CAROLINA and and NORTH CAROLINA STATE PERSONNEL COMMISSION,	)
	)
Respondents.	)

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

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QUESTIONS PRESENTED

1. When an employer has used the same biased testing procedure to evaluate both applicants for employment and incumbent employees seeking promotions, does a class action on behalf of every applicant or employee who might have been prejudiced by the test satisfy the commonality and typicality requirements of Rule 23(a) of the Federal Rules of Civil Procedure?

2. Where the discriminatory impact of the testing procedure upon applicants for employment and incumbent employees has been raised in an EEOC charge filed by an incumbent employee, and where the employer does not raise any affirmative defense involving the scope of the EEOC charge, may an unsuccessful applicant for employment who has not filed an EEOC charge join as co-plaintiff in a timely filed action under Title VII of the Civil Rights Act of 1964 as amended?

3. When the defendants and a plaintiff class have entered into a consent decree which does not purport to adjudicate the interests of persons not within the class, are persons claiming to have

been wrongfully excluded from membership in the plaintiff class precluded from seeking review of the district court's unfavorable class determination?

4. When a claim brought under 42 U.S.C. §1981 for racial discrimination in hiring has been erroneously dismissed because of the plaintiff's failure to have obtained a "right to sue" letter from the EEOC, may the error be deemed harmless because the employer has agreed not to discriminate in the future, without having agreed to any remedy for past discrimination in hiring?

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Federal Rules of Civil Procedure

Rule 23(a) 11
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OPINIONS BELOW

The opinion of the court of appeals (App. A, infra, 1A-11A) is reported at 671 F.2d 835. The opinions and orders of the district court (Appendix C, infra, 13A-19A, Appendix D, infra 20A-22A, Appendix E, infra, 23A) are unreported.

JURISDICTION

The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1): The judgment of the court of appeals was entered on February 25, 1982. A timely petition for rehearing with a suggestion for rehearing en banc was denied on April 21, 1982. (App, B, infra, 12A.)

RULES INVOLVED

1. Rule 23(a) of the Federal Rules of Civil Procedure provides in pertinent part:

> (a) One or more members of a class may sue or be sued as representative parties on behalf of all only if * * (2) there are questions of law or fact common to the class, (3) the claims or defenses of the representative parties are typical of the claims or defenses of the class * *
>
> * * *

2. Rule 23(c) of the Federal Rules of Civil Procedure provides in pertinent part:

> (c) * * *
>
> (3) The judgment in an action maintained as a class action under subdivision (b)(1) or (b)(2), whether or not favorable to the class, shall include and describe those whom the court finds to be members of the class. * * *

3. 42 U.S.C. §2000e-5(b) provides in pertinent part:

> (b) Whenever a charge is filed by or on behalf of a person claiming to be aggrieved . . . alleging that an employer . . . has engaged in an unlawful employment practice . . . the Commission shall . . . make an investigation thereof * * *

STATEMENT

Prior to 1975, applicants for employment with the North Carolina Employment Security Commission ("ESC") were hired on the basis of scores on a written test. The passing rate for white applicants (89.4%) was more than twice the pass rate (41.7%) for blacks. For those hired, the

score on the entry examination would be used for a two year period as the primary factor in promotional decisions.

In 1973, Walter Bailey, then an employee of the ESC, filed a charge with the Equal Employment Opportunity Commission complaining of racial discrimination by the ESC. As subsequently amended (App. 23A), Bailey's charge alleged that

> The above employer discriminates against Negroes and Females with respect to hiring, promotions, and job classifications on the basis of race and sex.
>
> The above employer discriminates against Negroes through the use of discriminatory tests.

In 1975, petitioner Marvin Dalton joined with Bailey and two others as plaintiffs to complain of racial discrimination by the ESC. Claims were presented under Title VII and under 42 U.S.C. §1981. Petitioner's individual claim involved alleged discrimination in hiring arising from the impact upon black applicants of the entry examination.

On April 28, 1978,[1] the district court allowed the case to proceed as a class action under Rule 23(b)(2) of the Federal Rules of Civil Procedure on behalf of

> All black persons who have been employed or denied employment since May 17, 1973, who are now employed, or who may in the future be employed by the Employment Security Commission of North Carolina. (App. 17A.)

In the order allowing the case to proceed as a class action, the district court dismissed petitioner as a named plaintiff because of his "failure to meet the jurisdictional prerequisites necessary to bring an action under Title VII," i.e., to have filed a charge with the EEOC and obtained a "right to sue" letter. (App. 18A.) The district court

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[1] The district court initially stayed proceedings pending resolution of the Eleventh Amendment issues decided in Fitzpatrick v. Bitzer, 427 U.S. 445 (1976). (App. 14A.)

Thereafter, adjudication of the merits was postponed while the district court considered defendants' motion to dismiss for failure to join the United States Secretary of Labor as a defendant. (App. 15A.)

recognized that petitioner could obtain relief as an unnamed member of the plaintiff class. (App. 18A.)

On February 27, 1980, the district court eliminated petitioner from further participation in as a unnamed member of the class when it redefined the class to exclude unsuccessful applicants for employment. (App. 20A-21A.)

Bailey and the class he represented were able to settle with defendants the issues remaining in the case.[2] (App. 5A-6A.)

After entry of the final decision, petitioner prosecuted an appeal to seek review of the order dismissing him as a

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[2] Resolution of the class claims included an award of back pay to all class members aggrieved by defendants' promotional testing policy, as well as prospective injunctive relief prohibiting the future use of unvalidated tests. In addition, defendants agreed to meet goals for promotion of black employees for a four year period following entry of the decree, as well as agreeing not to discriminate in the future "in hiring, promotion, upgrading, training, assignment or discharge."

The personal claims of the named plaintiff arising from his alleged wrongful discharge were resolved in separate settlement. (App. 6A.)

named plaintiff and the subsequent order refusing to allow plaintiff Bailey to represent unsuccessful applicants for employment. (App. 7A.)

In a decision filed on February 25, 1982, a panel of the court of appeals concluded that the district court had correctly dismissed petitioner as a co-plaintiff. In the view of the court of appeals, the district court did not have jurisdiction to hear and decide claim of discrimination in hiring because petitioner's claim was "not 'substantially identical' with that of Bailey, the only plaintiff with standing to maintain a Title VII action." (App. 8A.)

The panel then turned to petitioner's argument that he should have been included as an unnamed class member because "[u]nsuccessful applicants for employment and employees denied promotion are properly members of the same class when the unlawful employment practice at issue is a single test which has a disparate impact." (Brief of Appellant, Ct. of App., at 16.) The court of appeals rejected this claim:

> The conclusion that his dismissal as plaintiff was proper also disposes of Dalton's second claim on appeal (so far as a Title VII action is concerned) that he was improperly denied the right to represent applicants for employment as a class representative. (App. 9A.)

The panel agreed that petitioner's claim under 42 U.S.C. §1981 should not have been dismissed because of his failure to have filed a charge with the EEOC (App. 9A) but held that the portion of the consent decree which prohibited defendant from discriminating in the future "provides as much relief as Dalton could have secured had he continued as a plaintiff." (App. 9A-10A.)

Finally, the panel suggested that the consent judgment between defendant and the class represented by Bailey precluded any appeal by a person, like Dalton, who had been dismissed as a co-plaintiff and then excluded from the plaintiff class by adverse rulings of the district court. (App. 10A.)

REASONS FOR GRANTING THE PETITION

The issues presented by this case are of substantial significance to class action litigation and to the proper administration of Title VII of the Civil Rights Act of 1964 as amended. Certiorari is especially warranted because the decision of the court of appeals appears to be contrary to this Court's recent decisions in General Telephone Co. of Southwest v. Falcon, No. 81-574, (June 14, 1982) and Zipes v. Trans World Airlines, Inc., No. 78-1545 (February 24, 1982).

1. This Court has repeatedly reaffirmed that full relief under Title VII may be awarded to persons who have not filed their own charges with the EEOC. Albermarle Paper Co. v. Moody, 405 U.S. 422, 414 n.8 (1975); Franks v. Bowman Transportation Co., Inc., 424 U.S. 747, 771 (1976); United Air Lines v. McDonald, 432 U.S. 385, 389 n.6 (1977).

Prior to the Court's recent decision in General Telephone Co. of Southwest v. Falcon, No. 81-574 (June 14, 1982), the lower federal courts were divided as to whether and under what circumstances relief under Title VII could be awarded to unsuccessful applicants for employment

in a class action prosecuted by an incumbent employee.

In its decision in this case, the court of appeals held in a case prosecuted by a former employee complaining about the biased testing procedure used to evaluate incumbents who had applied for promotional vacancies, a district court lacks jurisdiction to grant relief under Title VII[3] to persons who were not hired because of the same biased testing procedure. (App. 8A.)

The decision of the court of appeals is flatly at odds with Falcon, where the Court held that if an employer "used a biased testing procedure to evaluate both applicants for employment and incumbent employees, a class action on behalf of every applicant or employee who might have been prejudiced by the test clearly would satisfy the commonality and typicality requirements of Rule 23(a)." (Id. at 10 n.15.)

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[3] The court of appeals agreed that relief could have been awarded to petitioner under 42 U.S.C. §1981, but held that such relief could not include a remedy for past discrimination in hiring. See infra at 12.

Under Falcon, petitioner and other black persons who were not hired because of the entrance examination should have been included within the plaintiff class with incumbent employees who were not promoted because of low passing scores on the examination.

2. As an alternative ground for its decision, the court of appeals held that because an unsuccessful applicant had not filed a charge with the EEOC, the district court lacked jurisdiction to grant relief to persons aggrieved by the impact of the biased test in hiring decisions. (App. 7A-9A.)

This jurisdictional theory is inconsistent with this Court's decision in Falcon, where the the Court accepted without discussion the Fifth Circuit's rejection of the employer's claim that a district court lacks "jurisdiction over the claim of hiring discrimination because the EEOC charge referred only to discrimination with respect to promotion" was accepted without discussion. 626 F.2d at 376-77 (5th Cir. 1980).

The jurisdictional argument rejected in Falcon is even less substantial in this case, where the named plaintiff had

amended his initial EEOC charge to complain of discrimination "through the use of discriminatory tests" in hiring and promotions.[4] (App. 24A.)

Moreover, any conclusion that the charge filing requirement of Title VII is a jurisdictional prerequisite is contrary to this Court's decision in Zipes v. Trans World Airlines, Inc., No. 78-1545, (February 24, 1982.

In Zipes, the Court made plain that "the provision for filing charges with the EEOC should not be construed to erect a jurisdictional prerequisite to suit in the District Court. . . [but is to be construed as] a requirement subject to waiver as well as tolling when equity so requires." (slip op. 11-12.) Any defects in the scope of EEOC charges have been

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[4] As we pointed out in our petition for rehearing (at 6), the court of appeals misapprehended the record when it stated (App. 5A n.3) that discrimination in hiring had not been raised before the EEOC. This erroneous finding by the court of appeals, made sua sponte by the court below, underscores the importance of the rule that "factfinding is the basic responsibility of district courts, rather than appellate courts." DeMarco v. United States, 415 U.S. 449, 450 n.* (1974).

waived in this case. Here, defendants have never sought to defend the denial of relief to petitioner and persons similarly situated because of any shortcoming in the the charges filed with the EEOC.[5]

Finally, a holding that EEOC charges can only be filed by a person actually aggrieved by a challenged employment practice, i.e., by a person who has "standing" (App. 8A) is contrary to the language of 42 U.S.C. §2000e-5 which directs the Commission to act in response to "a charge filed by or on behalf of a person claiming to be aggrieved." (emphasis supplied).

3. Although the court of appeals agreed that petitioner should have been permitted to appear as a co-plaintiff to

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[5] The scope of Bailey's EEOC charge was not at issue until after the decision of the court of appeals in this case.

The EEOC charges referred to by the court of appeals (App. 5A n.3) were filed by defendant State Personnel Commission as exhibits to its motion for summary judgment. In that motion, the Personnel Commission claimed that, unlike the ESC, it had not been named in the EEOC charges. The District Court deemed the motion for summary judgment untimely, and expressly relieved plaintiff of any obligation to respond. (App. 21A.)

assert his claim under 42 U.S.C. §1981, the court below held that the consent decree "provides as much relief as [petitioner] could have secured had he continued as a plaintiff in the §1981 action."(App. 10A). In addition, the court of appeals suggested that entry of the decree "precludes" petitioner's appeal. (Id.) Each of these rulings is flatly at odds with prior decisions of this Court.

First, the decree fails to provide any remedy for past discrimination. Had he prevailed in his Section 1981 claim, petitioner would have been plainly entitled to entry of "a decree which so far as possible eliminate[s] the discriminatory effects of the past." Louisiana v. United States, 380 U.S. 145, 154 (1964). Such a decree may of course include "affirmative equitable relief" Taylor v. Jones, 653 F.2d 1193, 1204 (8th Cir. 1981), for past discrimination in hiring.

Second, Rule 23(c)(3) makes plain that a judgment in a case brought as a class action is only binding upon those who are "include[d] and describe[d]" in the judgment. Thus, petitioner and other

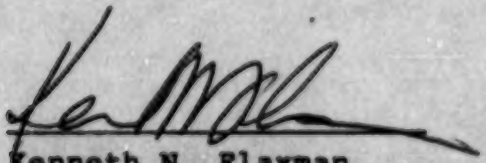
persons similarly situated who are not included within the class defined in the consent decree are not bound by the terms of the decree. Board of School Commissioners v. Jacobs, 420 U.S. 128 (1975).

As in United Air Lines, Inc. v. McDonald, 432 U.S. 432 U.S. 385 (1977), petitioner had standing to seek review of the adverse class decision. Certiorari should be granted to correct the contrary conclusion by the court of appeals.

Conclusion

The petition for writ of certiorari should be granted.

Respectfully submitted,



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